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Civil Action No. 7:06CV00210

MEMORANDUM OPINION

By: Hon. Glen E. Conrad
United States District Judge

Background

On November 22, 2004, Clark pled guilty to Count One of the indictment pursuant to a

written plea agreement. In this agreement, the government agreed to dismiss the remaining charges against Clark. The government also agreed to recommend a reduction for acceptance of responsibility, as well as a sentence at the low to middle range of the applicable sentencing guidelines. In exchange, Clark agreed to “waive [his] right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon [him] by the Court,” as well as his right to appeal “sentencing guidelines issues.” (Plea Ag. at 5-6). Clark was subsequently sentenced to a total term of imprisonment of 156 months. He did not appeal his conviction or sentence.

Clark filed the instant § 2255 motion on April 11, 2006. In one of his claims, Clark alleges that his attorney was constitutionally ineffective for failing to file a notice of appeal.¹ Specifically, Clark alleges that although he instructed his attorney to file a notice of appeal and the attorney promised Clark’s mother that a notice of appeal would be filed, the attorney disregarded Clark’s instructions and did not file the requested appeal. Additionally, Clark alleges that his attorney did not advise him that a notice of appeal had not been filed until after the time for filing an appeal had expired.

Discussion

The respondent has moved to dismiss all of Clark’s claims on the basis that Clark waived the right to collaterally attack his conviction and sentence. However, Clark’s waiver of collateral-attack rights does not bar Clark’s claim that his attorney was ineffective for failing to file a notice of appeal. This claim falls outside the scope of the waiver and must be addressed on

¹Clark’s additional claims are as follows: (1) his attorney was ineffective for failing to request a competency hearing and the court erred by failing to conduct a competency hearing sua sponte; (2) his guilty plea was not entered into knowingly or voluntarily; and (3) his attorney was ineffective for failing to investigate his mental history.

the merits. See United States v. Embree, 169 Fed. Appx. 761, 762 (4th Cir. 2006) (holding that Embree's waiver of collateral-attack rights did not bar the claim that his attorney was ineffective for failing to consult with him regarding an appeal, since the claim was analogous to the claim asserted in United States v. Attar, 38 F.3d 727, 732-33 (4th Cir. 1994), "where [the Court] held that the waiver of the right to appeal did not bar a claim concerning a complete lack of counsel during sentencing proceedings."). Therefore, the court will deny the government's motion to dismiss as to Clark's claim that his attorney was ineffective for failing to file a notice of appeal, and direct the government to address the merits of this claim within twenty days.²

Conclusion

For the reasons stated, the government's motion is denied in part. The Clerk is directed to send certified copies of this opinion and the accompanying order to the petitioner and counsel of record for the respondent.

ENTER: This 26th day of January, 2007.



United States District Judge

²Because Clark will receive another opportunity to file a direct appeal if the court ultimately rules in his favor, the court will reserve ruling on the government's motion to dismiss as to Clark's other claims. See United States v. Killian, 22 Fed. Appx. 300,301 (4th Cir. 2001) (noting that when a district court grants a § 2255 motion due to counsel's failure to file a direct appeal, the district court should not address the merits of the petitioner's remaining claims, but instead dismiss those claims without prejudice).